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Supreme Court of the United States

No. 78-1548
October Term, 1979

CALIFORNIA BREWERS ASSOCIATION, *et al.*,

Petitioners,

vs.

ABRAM BRYANT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Petitioners California Brewers Association and California Breweries

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was officially reported at 585 F.2d 421, unofficially reported at 18 F.E.P. Cas. 826, and is set forth in Appendix A to the Petition for Writ of Certiorari. No opinion was rendered by the district court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1978. Petitioners filed a timely motion for rehearing, which was denied on January 11, 1979.

A timely petition for writ of certiorari was filed on April 11, 1979.

Certiorari was granted on June 4, 1979.

Jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . ."
>
> 42 U.S.C. § 2000e-2(h) (1976 ed.) p. 1238.

QUESTIONS PRESENTED

For almost 25 years, collective bargaining agreements in the California brewing industry have included a provision that any employee who has worked for 45 weeks in any calendar year is classified as a Permanent employee and is entitled to greater benefits and job security than other employees.

The questions presented are:

I

Whether this provision is part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

II

Whether the Ninth Circuit's definition of the term "seniority system" conflicts with the definition of this

Court in *Teamsters v. United States* (1977), 431 U.S. 324, and the definition of the Sixth Circuit in *Alexander v. Machinists, Aero. Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, *cert. denied* (1978), 436 U.S. 946.

III

Whether the Court of Appeals erred by summarily deciding the seniority issue before development of a factual record concerning the operation and purposes of the brewery industry system.

STATEMENT OF CASE

Summary

In this case, the Respondent, plaintiff below, alleges that the seniority provisions of the brewery industry collective bargaining agreement perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Under one of these provisions, any employee who has worked for 45 weeks in a calendar year is a Permanent employee and is entitled to greater benefits and job security than non-Permanent employees.

The Court of Appeals considered the issue of whether the brewery industry seniority system was immune under Section 703(h) of Title VII, after this Court decided *Teamsters v. United States* (1977), 431 U.S. 324. In essence, the Court of Appeals decided that the 45 week provision was not part of the overall seniority system, and therefore might violate Title VII despite Section 703(h).

Respondent's Complaint

Respondent Abram Bryant, plaintiff below,[1] filed his original Complaint on October 19, 1973 [R.1], an Amended Complaint on February 15, 1974 [R.106], and a Second Amended Complaint on May 22, 1974. [A.9.]

The Complaint alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, and provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, because of "seniority and referral" provisions in the collective bargaining agreement. [A.16.] The defendants are an employer association,[2] a union joint board,[3] seven breweries,[4] and six unions.[5]

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[1]Respondent Abram Bryant was first employed by petitioner Falstaff in 1968. Since that time, he was employed from time to time by Falstaff. [R.452.] He also worked for petitioner Hamms for a brief period. [R.453.]

[2]The employer association is the California Brewers Association, one of the petitioners before the Court.

[3]The union joint board is the Teamster Brewery & Soft Drink Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4]The seven breweries are: Miller Brewing Company, Joseph Schlitz Brewing Company, Anheuser Busch Incorporated, Pabst Brewing Company, Theodore Hamm Company, General Brewing Company, Falstaff Brewing Corporation.

[5]The six defendant unions are: Local Union 856 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Sales Drivers and Dairy Employees Union Local 166; the Bottlers Union Local 896 of the International Brotherhood of Teamsters; Beer Drivers and Salesmens Union Local 888 of the International Brotherhood of Teamsters; Drivers Union Local 203 of the International Brotherhood of Teamsters; Sales Drivers Helpers and Dairy Employees Union Local 683 of International Brotherhood of Teamsters.

Respondent's Complaint also includes allegations that the defendant unions breached their duty of fair representation by failing to negotiate a contract that secured to the Respondent and members of his class "seniority and referral benefits to which they are entitled." [A. 19.]

The primary focus of Respondent's claims is the "45 week provision" of the seniority system, contained in the collective bargaining agreement between California breweries and brewery unions.[6] Under this provision a Temporary employee must work 45 weeks in one calendar year before being classified as a Permanent employee and thus entitled to additional fringe benefits and greater job security. The operation of this provision is set forth in Sections 4 and 5 of the Agreement, and is discussed *infra.*

According to the allegations of the Respondent, the seniority system, even if applied fairly, perpetuates past discrimination in the brewery industry. Respondent's theory of recovery is fully set forth in the verified Second Amended Complaint:

> "*13. In past years, going back as far as their inception, the defendant employers have dis-

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[6]Respondent also alleged intentional discrimination in two incidents of alleged deviation from the terms of the collective bargaining agreement. Respondent claims that certain unidentified non-black employees who worked forty-five weeks in two (2) calendar years were granted permanent status. Second Amended Complaint, Paragraph 21. [A.17.] However, according to Respondent's Answers to Interrogatories, this incident evidently occurred in 1958. [R.297.] Respondent admits that since the date of his employment, he is unaware of any non-black employee who has achieved permanent status without satisfying the 45 week provisions. [R.297, 306.] Respondent also alleged that after filing of the original Complaint his local union, Local Union 856 of the International Brotherhood of Teamsters, improperly failed to refer him to unidentified job assignments, referring less senior white workers instead. [A.18.]

criminated against blacks both in hiring and employment.

* * *

"*14. The vehicles for the perpetuation of this invidious discrimination are the seniority and referral provisions of the collective bargaining agreement, which were negotiated a number of years ago. These provisions have been negotiated and maintained in the collective bargaining agreement by the defendant employers and unions acting in concert with each other and through the California Brewers Association and the Joint Board as their agents. All defendant employers and unions have acted to enforce these illegal provisions and, in particular, the Sections 4(a)(1) and 4(5)(a) dealing with permanent status.

"*15. Given the circumstances which have existed in the brewery industry in California, these seniority and referral provisions have operated to prevent plaintiff and the members of his class from achieving the rights and benefits accorded permanent employees or even from having a reasonable opportunity of achieving those rights and benefits."

Second Amended Complaint, Paragraphs 13-15. [A.16-17.]

Collective Bargaining Agreement

The collective bargaining agreement in this case is between the California Brewers Association on behalf of various breweries and the Teamster Brewery and Soft Drink Workers Joint Board of California.[7] [A.25.]

[7]Substantial changes have occurred in the brewery operation in California which must be examined at trial. No Northern California brewery formerly covered under the collective bargaining agreement is in operation. Falstaff Brewing Corporation, Theodore Hamm Company and General Brewing Corporation formerly operating in the San Francisco area are all closed. There are only four companies currently operating in Southern California: Miller Brewing Company, Jos. Schlitz Brewing Company, Anheuser-Busch, Inc. and Pabst Brewing Company. Moreover, Pabst is in the process of closing its Southern California brewery. These companies no longer operate under a California Brewers Association agreement but have individual agreements. The Teamster Brewery & Soft Drink Workers Joint Board of California is no longer in existence and is not a contracting party.

It establishes an industry-wide seniority system, defined in Sections 4 and 5 of that contract. [A.27 *et seq.*, 36 *et seq.*]

A. The Separate Tiers of Seniority in the Brewery Industry.

The preamble to Section 4 specifically provides that with respect to Brewers and Bottlers there shall be five classes of employees "for the purposes of seniority only": (i) New employees; (ii) Apprentices; (iii) Temporary Bottlers; (iv) Temporary employees (other than Bottlers); (v) Permanent employees. [A.27.]

An individual's status in any of these classes (except apprenticeship) is solely a function of time served in a job classification in the industry.

The contract provides that an employee acquires Permanent status, and enhanced job benefits and security, after working 45 weeks in one calendar year. [A.27.] This 45 week provision has been in effect for almost twenty-five years. [A.16, R.7.] A Temporary employee must have worked at least 60 working days within a calendar year. Apprentices are covered by separate provisions. New employees are persons who

do not qualify as a Permanent employee, Temporary employee or Apprentice.[8] [A.28-29.]

B. The Operation of Seniority in the Brewery Industry.

As the Respondent once conceded, "[t]he seniority clause with which we are concerned is probably as elaborate as any there is." Plaintiffs' Memorandum of Points and Authorities in Response to Defendants' Motions to Dismiss, page 3, note 2. [R.79.] This seniority system is based upon both "industry-wide" seniority and "plant" seniority. It is used for such competitive purposes as determining the order in which employees are dispatched for particular jobs, and the order in which employees are laid off.

1. *Dispatching and Job Referrals.*

Section 5 of the collective bargaining agreement sets forth the procedures by which "the Individual Employer must secure all employees covered by this Agreement." [A.36.]

If a brewery needs workers, employees are dispatched through the employment offices of the appropriate local union affiliated with the Teamster Brewery & Soft Drink Workers Joint Board of California. The contract explicitly provides that referral of persons for employment is "a responsibility of the union and the

[8]Other sections of the collective bargaining agreement relate to the loss of seniority. For example, a Permanent employee who is not employed for a period of two years loses the status of a Permanent employee (Section 4(a)(5)). Similarly an employee who quits the industry or is discharged for failure to comply with the union security requirements loses his status and seniority (Section 4(a)(5)). An example of the duality of the seniority system is apparent in this same section: a Permanent employee who is discharged by an employer loses establishment seniority with that employer but not industry seniority.

Local Unions in carrying out the seniority and employment rights provided in this Agreement." Section 5(g). [A.40.]

Employees who have been on layoff are dispatched according to the following contractually specified order of seniority[9]:

First, Permanent employees of the individual employer "in descending order of seniority, the employee with the highest seniority to be dispatched first";

Second, Permanent employees registered in "the established bumping area"[10];

Third, Temporary employees of the individual employer;

Fourth, Temporary employees registered in the established area;

Fifth, New employees of the individual employer;

Sixth, New employees in the established area.

After the employment rolls have been exhausted, the appropriate local union must next dispatch applicants who are registered for employment.[11]

[9]The order of dispatch is substantially the same for bottlers. [A.37-38.]

There are two specific exceptions to the application of these priorities in the contract. If an employer has a job for an employee, other than a Bottler for less than thirty-seven and one-half straight-time hours, the local union shall dispatch any readily available employee without regard to seniority. However, such work does not "count" toward establishment of seniority rights. If an employer requests a Bottler for work less than thirty straight-time hours in a calendar week, registered Temporary Bottlers are dispatched first. [A.36-37.]

[10]The "established bumping areas" under the agreements are the Northern California area and the Southern California area.

[11]The relevant contractual provision, Section 5(c) reads as follows:

"[T]he Local Union shall dispatch and the Individual Employer shall hire as follows:

(This footnote is continued on next page)

In summary, job opportunities for all employees are allocated according to the seniority principles of the contract. These principles mean that satisfying the 45 week provision depends on acquiring enough job assignments to accumulate the necessary service time. As between Temporary employees, job assignments are also allocated according to seniority. Section 5(c)(4). [A.38.]

"(1) *In dispatching the Local Union shall first dispatch in accordance with the seniority provisions set out in Section '4' hereof in descending order of seniority, the employee with the highest seniority to be dispatched first.*

"(2) In the case of Brewers, Drivers, Shipping and Receiving Clerks and Checkers the Local Union shall next dispatch permanent employees registered in the established area who may be unemployed and thereafter temporary employees registered in the established area who may be unemployed and thereafter new employees who may be unemployed, subject to Section 43. In the case of Bottlers the Local Union shall next dispatch permanent Bottlers registered in the previously established bumping area who may be unemployed, and thereafter permanent employees registered in the previously established bumping area in other classifications, who may be unemployed, and thereafter the Individual Employer may employ Temporary Bottlers. The Individual Employer shall have full right of selection among said employees.

"(3) The Local Union shall next dispatch applicants who may be registered for employment under Section '5 (d)' hereof, provided, however, that in dispatching such applicants those with the most experience in the work in the State of California shall be dispatched first and those with the least experience in such work in the State of California shall be dispatched last, and thereafter those with the most experience in the work regardless of where acquired shall be dispatched first and those with the least experience in the work last, and thereafter those with no experience in the work shall be dispatched in accordance with the date the application was filed, those with the earliest date being dispatched first. The Individual Employer shall have full right of selection among said employees dispatched.

"(4) *The order of dispatch of permanent employees and of temporary employees and of new employees within classifications as provided in paragraph (c) (2) hereof shall be on the basis of the length of service in the industry in California.*

"(5) In the event an employee is dispatched pursuant to subsection '(c) (1)' hereof and he does not report for work within forty-eight (48) hours, he shall lose his seniority rights in the individual establishment to which he was dispatched, unless such failure is excused under Section '7(a), (b) or (d)' hereof." [Emphasis added.]

Section 5(c), [A.37-38.]

2. *Layoffs.*

All layoffs are decided on the basis of a combination of industry and plant seniority. Section 4(c). [A.30-31.] New employees are laid off first, followed by Temporary employees. Permanent employees have the most job security. Within each classification, Permanent, Temporary or New, the least senior employee based on plant seniority is the first laid off and the most senior employee who is not working is the first rehired. Also, any employee "bumped" by a Permanent employee will be the least senior Temporary or New employee at the particular plant. Section 4(b). [A.30.] Separate seniority lists are maintained for Apprentices.

Plant seniority dates from the first day of employment in the seniority tier within the establishment. When seniority of two or more employees dates from the same date, relative seniority is established based upon the length of service in California breweries. Section 4(c).[12] [A.31.]

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[12]An employee who has seniority at one establishment or plant but is working in another establishment can lose his seniority if he refuses recall to the first plant or establishment (Section 4(d)). However, an employee who accepts a transfer from one plant to another plant retains his first plant seniority for a period of two years from the date of transfer provided he is not recalled or does not transfer back to the first plant (Section 4(e)).

3. *Permanent Employees' Job Assignment and "Bumping" Rights.*

By satisfying the 45 week provision, the Permanent employee acquires rights to fill vacancies or jobs held by Temporary or New employees.

A Permanent employee who has been laid off by one employer in the industry may be dispatched to another employer in the same area. The Permanent employee has a right to replace the Temporary or New employee with the lowest plant seniority (Section 4(b)). [A.30.] As between two or more unemployed Permanent employees, the Permanent employee with the most industry seniority will be entitled to a certain job. Section 5(c)(1). [A.37.]

Proceedings in the District Court

On September 11, 1974, the district court granted motions to dismiss as to all defendants because of plaintiff's failure to state a claim upon which relief could be granted. [A.43.] The district court concluded that the seniority and referral provisions complained of by the Respondent were analogous to the "last-hired, first-fired" practices permitted under Title VII. 585 F.2d at 424. Judgment was entered on October 17, 1974. [A.45.]

Appeal to the Court of Appeals for the Ninth Circuit

On appeal, Respondent emphasized that "seniority and referral systems which are not discriminatory on their face, may nevertheless be struck down if they serve to perpetuate the discrimination of the past." Opening Brief for the Appellant, page 9. The appeal was fully briefed and argued before the Ninth Circuit

prior to the decision of this Court in *Teamsters v. United States*. Supplemental briefs discussing the import of *Teamsters* were submitted to the appellate court. Thus, the parties focused on the importance of Section 703(h) and the seniority issues of the case, particularly as illuminated in *Teamsters*, for the first time on appeal to the Ninth Circuit.

On November 3, 1978, the Court of Appeals for the Ninth Circuit, in a two to one decision, reversed the judgment of the district court and remanded the case "for further proceedings consistent with the views . . . expressed" in the court's opinion. 585 F.2d at 428.

The Ninth Circuit held that the 45 week provision of the collective bargaining agreement was neither a seniority system nor part of such a system:

> "No comprehensive definition of 'seniority system' is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the fundamental component of such a system. Accordingly, we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination.
>
> "The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases."
>
> 585 F.2d at 426.

Characterizing the 45 week provision as "an all-or-nothing proposition," 585 F.2d at 427, the Ninth Circuit ruled that "the brewery industry's 45 week

requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service." 585 F.2d at 426.

The Ninth Circuit concluded that since the 45 week provision had no relationship to any seniority system, Respondent would not be required to prove intentional discrimination. Rather, unlawful employment discrimination might be established if Respondent demonstrates adverse impact against blacks deriving from the routine application of the provision:

> "Because the 45-week provision is not part of a seniority system, plaintiff is not required to prove any form of intentional discrimination to make out a Title VII violation. Instead, the normal rule applies that 'a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.' *Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861. The controlling principle is that such employment practices which have discriminatory impact violate Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).
>
> * * *
>
> "Accordingly, the judgment must be reversed and the cause remanded to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, under standards enunciated in *Griggs.*" [Footnote omitted.]
>
> 585 F.2d at 427-28.

SUMMARY OF ARGUMENT

In *Teamsters v. United States* (1977), 431 U.S. 324, this Court held that under Section 703(h), the routine application of a bona fide seniority system cannot be a violation of Title VII.

Throughout this litigation Respondent has proclaimed that the brewery seniority system, including the 45 week provision, perpetuates the effects of past discrimination. In other words, the essence of Respondent's attack is identical to the theory rejected by this Court in *Teamsters.*

In this context, the primary issue to be decided is whether the 45 week provision is a component of the seniority system, potentially protected by Section 703(h).

I

Contrary to the judgment of the Ninth Circuit, the 45 week provision is not an "all-or-nothing proposition." In fact, Temporary employees have crucial seniority rights respecting job referrals and layoffs. Satisfaction of the 45 week provision merely augments those rights. The provision is an important part of a single, integrated, tiered structure, in which job security and other benefits are governed by a delicate, complicated blend of industry and plant seniority.

II

The decision of the Ninth Circuit, if allowed to stand, would represent a major departure from federal policies allowing employers and unions maximum possible freedom, subject to good faith, in adapting principles of seniority to their own collective bargaining situation. *Ford Motor Company v. Huffman* (1953),

345 U.S. 330, 338. This policy preserves flexibility and adaptability in collective bargaining, which is necessary for resolution of the difficult conflicts of interest inherent in industrial life.

As a result, the opinion of the Ninth Circuit is an unprecedented attempt to impose rigid restrictions concerning the operation of seniority.

Moreover, the appellate court's definition violates the principle articulated in *Teamsters v. United States* that no single type of seniority system is preferred under Section 703(h) of Title VII.

Finally, the Ninth Circuit has dissected an operating seniority system and has selected one component of that system for judicial scrutiny under Title VII. This decision to view the 45 week provision as a separate device unrelated to the seniority system was rendered without an adequate factual record, and was premised on the most theoretical hypotheses about the operation of the overall seniority system.

III

The decision of the Ninth Circuit on the "seniority" issue is also contrary to (i) the admissions of all parties in this case that the 45 week requirement was part of a seniority system; (ii) uncontroverted facts concerning the character, operation and structure of the seniority system; and (iii) the explicit admonitions of this Court in *Teamsters*. Indeed, the Ninth Circuit decided that this component was not part of a seniority system despite the fact that all parties initially

and extensively briefed the case assuming and admitting that the 45 week requirement was part of such a system.

IV

Unless Title VII was intended to usher in a new regime in which individual components of seniority systems are closely scrutinized apart from standards of good faith, the opinion of the Ninth Circuit must be vacated and its judgment must be reversed. In short, the 45 week provision must be considered part of the overall seniority system. Federal courts should not attempt to enter the thicket of trying to set inflexible rules for seniority systems. Rather, they should continue to impose judicial standards that require that the bargains of employers and unions be products of good faith. This long-standing principle, these standards of judicial scrutiny, should not be ignored in an effort to circumvent *Teamsters v. United States.*

Therefore, the Court should vacate the judgment of the lower court and rule that the 45 week provision is a part of the seniority system of the brewery industry. When the case is remanded, Respondent should be confined to his allegations of intentional discrimination.

Alternatively, the district court should be instructed to disregard the opinion of the Ninth Circuit and to consider whether the 45 week provision is part of the seniority system, based upon a full factual record in light of *Teamsters v. United States.*

ARGUMENT

I

RESPONDENT ALLEGES THAT THE BREWERY INDUSTRY SENIORITY SYSTEM, INCLUDING THE 45 WEEK PROVISION, PERPETUATES THE EFFECTS OF PAST DISCRIMINATION. RESPONDENT'S CENTRAL THEORY OF RECOVERY HAS BEEN EXPLICITLY REJECTED IN TEAMSTERS VS. UNITED STATES.

The Second Amended Complaint is clear and unambiguous with respect to Respondent's central theory of recovery under Title VII. The Complaint alleges that the seniority and referral provisions of the collective bargaining agreement were "vehicles for the perpetuation of . . . invidious discrimination." Second Amended Complaint, paragraph 14. [A.16.]

> "[The seniority system's] illegality arises because it has had the effect of perpetuating a pattern of racial discrimination which existed in years gone by. [Citations omitted.] * * *
>
> "*Plaintiff's attack is, therefore, aimed directly at the seniority system created in the contract; for only by reconstructing that system so that it protects Black and White workers alike, without giving one a headstart over the other, can equal employment rights be realized.*
>
> * * *
>
> "A careful reading of the complaint will disclose that plaintiff is not objecting to the seniority clause because it favors employees with greater seniority over newer employees. Plaintiff attacks the seniority clause because it is the vehicle by which an illegal pattern of discrimination which existed in the breweries in the past has been perpetuated." [Emphasis added.]
>
> Plaintiff's Memorandum of Points and Authorities in Response to Motion to Dismiss, pp. 2, 25-26. [R.78, 101-2.]

This theory of recovery is indistinguishable from the arguments advanced by numerous plaintiffs, prior to the decision of this Court in *Teamsters v. United States.* As alleged by Respondent, the vice of the brewery system was that it prolonged the effects of past discrimination by keeping minority workers in Temporary employee positions, because of the preferences conferred on existing Permanent employees.

The words of this Court in *Teamsters v. United States* are the clearest indication that "the routine application of a bona fide seniority system [is] not unlawful under Title VII," 431 U.S. at 352, even if it operates to delay elimination of pre-Act patterns of employment.

> "Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.
>
> "* * * Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise

those rights, even at the expense of pre-Act discriminatees."

431 U.S. at 352-54.

II

THE 45 WEEK PROVISION IS NOT AN "ALL-OR-NOTHING PROPOSITION," SINCE TEMPORARY EMPLOYEES ALSO HAVE SENIORITY RIGHTS. RATHER, IT IS AN IMPORTANT PART OF A SINGLE, INTEGRATED, TIERED SENIORITY SYSTEM.

The California brewery seniority system is one integrated structure, divided into separate tiers of job security and benefits—governed by a delicate blend of plant and industry-wide seniority. The labor contract creates a seniority system, and the 45 week provision is part of that system.

The Ninth Circuit misconstrued the 45 week provision as an "all-or-nothing proposition." 585 F.2d at 427. The Court of Appeals erroneously held that, until an employee has worked 45 weeks in a calendar year, "it makes no difference how long a person has been employed by a department, plant, company, or industry. . . ." 585 F.2d at 427. This is not true, since length of service plays a critical role in the allocation of job opportunities among Temporary employees, and even among New employees.

The process of dispatching employees to vacant jobs illuminates the Ninth Circuit's error. To be sure, unemployed Permanent employees are dispatched first. However, among Temporary employees, jobs are also allocated according to the employees' length of service in the brewery industry. This means that the chances for becoming a Permanent employee are enhanced over time: The more senior Temporary employees are more

likely to work the necessary period in a year because they have first claim to the jobs.

Unlike seniority provisions that begin to accumulate only after a probationary period, the brewery system confers seniority on Temporary employees and on New employees as well. The Court of Appeals overlooked this fact when it stated that the brewery seniority system "does not involve an increase in employment rights or benefits based upon the length of . . . accumulated service." 585 F.2d at 426.

In short, the acquisition of Permanent status is not independent of total time worked, except in the most technical sense. To be sure, an employee's chance to become a Permanent employee is influenced by other factors, such as plant seniority which governs layoffs among Temporary employees. It may also be influenced by luck of the draw, since one Temporary employee might be dispatched to a job that unforeseeably ends quickly, while another less senior Temporary employee is dispatched to a job that lasts. Still, the contractual blend of industry and plant seniority governs job referrals and layoffs.

The Ninth Circuit misunderstood the seniority system. Consequently, it overestimated the potential for unlawful discriminatory manipulation of the system. The Ninth Circuit held that the system was "particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." 585 F.2d at 427. It is hard to characterize this passage from the Court's opinion as anything but pure theory, since the record is devoid of any allegation that "manpower

requirements" and "patterns" have been manipulated. As with all seniority systems, the brewery structure, including the 45 week provision, provides that "seniority rights . . . usually accumulate automatically over time." Moreover, because of the system's provisions respecting dispatching and layoffs, "it is difficult to manipulate [the system] in a discriminatory manner," except in derogation of the contractual provisions. 585 F.2d at 427.

III

UNDER TITLE VII AND FEDERAL LABOR LAW, EMPLOYERS AND UNIONS MUST BE GUARANTEED MAXIMUM POSSIBLE FREEDOM, SUBJECT TO GOOD FAITH, IN ADAPTING PRINCIPLES OF SENIORITY TO SPECIFIC COLLECTIVE BARGAINING SITUATIONS.

Section 703(h) of Title VII protects bona fide seniority systems. *Teamsters v. United States* (1977), 431 U.S. 324. This special statutory protection reflects the intention of Congress to limit the intrusiveness of governmental regulation incident to civil rights legislation.

> "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible.' "
>
> *Steelworkers v. Weber* (1979), ... U.S. ...., quoting H.R. Rep. No. 914, 88th Congress, 1st Session, Part 2 (1963), at 29.

Moreover, seniority systems were an appropriate special concern of Congress because of their special nature and purpose in collective bargaining and industrial relations. To be sure, seniority systems are not the

inventions of employers. They are the creatures of collective bargaining and labor contracts in which unions asserted an interest in restraining the employers' discretion to reward and punish employees. In the words of Professor Benjamin Aaron:

> "[E]very seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all the others."
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> B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1534-35.[18]

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[13]Professors George Cooper and Richard B. Sobol summarized the traditional justifications for seniority in an article generally critical of the impact of seniority systems on black workers.

> "Seniority has traditionally been championed by labor rather than management, and has usually been adopted not because the employer thinks it necessary or even helpful, but because of the bargaining strength of the union.
>
> "Although the lines between them are not sharp, three reasons can be articulated for organized labor's insistence on seniority systems. First, although seniority does not completely tie the hands of the employer, it does tend to reduce his options in allocating work. As a result, it provides employees with a degree of independence from the whims or personal preferences of supervisory officers. Second, seniority provides union leadership with an instrument for determining its position in case of a dispute among its members, and thereby permits the union to avoid making an ad hoc decision to assert one worker's claim rather than another's. From the point of view of the employee, the effect of seniority in regulating the union's position is not unlike its effect in regulating the decisions of managament. Third, seniority systems provide all employees with a basis for predicting their future employment position." [Footnotes omitted.]
>
> G. Cooper and R. B. Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv.L.Rev. 1598, 1604-05.

Historically, most seniority systems did not have their genesis as obstacles to the struggle for equality between black and white; rather, such systems were born of the struggle for equity between labor and management. Seniority was devised as an objective, neutral criterion designed to protect employees from another form of discrimination—discrimination against union adherents and leaders. It is also a relatively effective, easily-administered, and widely-accepted technique for making employment decisions that would otherwise be controversial and upsetting. Thus, one objective of seniority systems is the achievement of a degree of stability, predictability and objectivity in industrial relations. This objective is consistent with federal labor policy.

> "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes."
>
> *Boys Market v. Retail Clerks Union* (1970), 398 U.S. 235, 251.

Seniority systems like arbitration procedures and no-strike guarantees are important means of protecting industrial peace. Admittedly, statutes permitted employers and unions to decide for themselves whether or not to adopt these provisions. Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d). However, federal law consistently enforced these provisions, once adopted by the parties, as a means of encouraging collective bargaining and peaceful resolution of industrial disputes. *Cf. Boys Markets v. Retail Clerks Union* (1970), 398 U.S. 235.

In short, seniority has an important role in this nation's policy of employment relations. It is a reasonable, flexible, adaptable technique for negotiation and compromise of the diverse conflicts of interest that may exist among employees. For this reason, if for no other, employers and unions must be afforded maximum possible freedom in adapting the principles of seniority to the peculiarities and exigencies of their own collective bargaining situations.

A. The wide variety of seniority provisions in American industry dispels the notion that time is the sole element of a seniority system.

A seniority system is far more easily described than defined.

> "Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. . . . [T]he different types . . . range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity."
>
> B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1534.

However, there are certain patterns in seniority systems, which patterns might suffice as basic components of an appropriate definition.[14]

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[14]Although the literature on seniority is plentiful, attempts to define "seniority systems" are rare and conclusory. There have been many compilations of different seniority clauses. See, *e.g.*, U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective Bargaining Agreements: Administration of Seniority (1972); T. J. McDermott, Types of Seniority Provisions and the Measurement of Ability, 25 Arbit.J. 101 (1970); F. H. Harbison, Seniority Policies and Procedures as

(This footnote is continued on next page)

Seniority is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job. A *seniority system* is any system by which employment decisions are made or job benefits are allocated according to a standard of seniority, whether or not that standard is utilized alone or as one factor combined with other standards. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521; T. J. McDermott, *Types of Seniority Provisions and the Measurement of Ability*, 25 Arbit. J. 101 (1970). The standard of "time served" or "seniority" may involve any or all of the following:

(1) There may be rules on how "seniority" or "time served" is accumulated. In this context, the standards usually attempt to define what kinds of time count for purposes of accumulating seniority. Service in a particular job, department or unit might be necessary to acquire seniority. *Teamsters v. United States*, 431 U.S. at 355, n. 41. Only time served during certain times of a year might be counted for "seniority," as in industries where employment fluctuates dramatically and seasonal employees inflate the employment rolls. A probationary period might exist, so that seniority is not acquired or not measured until after the completion of the probationary period. Finally, time not worked whether because of absence, illness, vacation, union business, suspensions, temporary reassignment or temporary promotions may or may not count toward accumulated seniority. U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective

Developed Through Collective Bargaining (1941); BNA, Collective Bargaining Negotiations and Contracts: Basic Patterns—Clause Finder; CCH, Union Contract Clauses (1954). Collectively, the literature on seniority is a testament to the diversity of seniority systems in the United States.

Bargaining Agreements: Administration of Seniority, 5-7 (1972).

(2) There may be rules on how accumulated seniority is lost, whether because of layoff, specified periods of unemployment, failure to report for work, disciplinary discharge, or resignation. *Id.*, 25-31.

(3) There may be rules on how accumulated seniority is reinstated or regained, as, for instance, when an employee is temporarily absent but is reemployed within a specified period of time. *Id.*, 30-31.

(4) There may be rules on how accumulated seniority is transferred, as when an employee transfers from one department or plant to another. *Id.*, 21-24. For example, if an employee is promoted to a supervisor's position that is outside the bargaining unit, his seniority might continue to accumulate; or it might be retained without accumulation; or it might be lost.

(5) Finally, there may be rules on how accumulated seniority is applied to particular employment decisions. These rules might involve the types of employment decisions and job benefits that are governed by the seniority principle: Layoffs, promotions, transfers, shift assignments, overtime, vacations, wage increases, health and pension benefits are examples. The rules might also dictate the manner in which seniority is applied in combination with other standards such as a supervisor's evaluation, a productivity standard, or any number of other possible factors.

Significantly, contrary to the Ninth Circuit's definition, the many different seniority systems generally fall into two basic categories. One is a more rigid type based on strict seniority. Under strict seniority,

the employer must give preference to the more senior employee without regard to any other considerations. The more prevalent contractual provisions provide for "modified seniority." These "modified seniority" provisions are formulated to serve the basic aims of seniority, but not in total derogation of other factors such as skill, productivity or special training. *See, e.g.:* F. Elkouri & E. A. Elkouri, *How Arbitration Works* (3d ed., 1973), 567-571; U.S. Department of Labor, Bureau of Labor Statistics, Bull. No. 1425-14, Major Collective Bargaining Agreements: Administration of Seniority (1972).

On account of the prevalence and diversity of seniority systems, courts have not entered the thicket of defining "seniority" or imposing rigid rules concerning the operation of seniority. As a result, there is little precedent for the Ninth Circuit's ruling that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases." 585 F.2d at 426. Whatever the general truth of this ruling, the Ninth Circuit omitted any discussion of the important limitations and conditions that serve to define and qualify the operation of seniority.

Simply, time is rarely the sole element of a seniority system. This Court recognized this fact in *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521. In this case, a veteran reemployed at the end of World War II challenged the artificial seniority protection conferred upon a union officer. The Court permitted the use of this "superseniority," stating:

> "Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. [Citation omitted.] There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining 100-102 (1945); Harbison, Seniority Policies & Procedures as Developed through Collective Bargaining 1-10 (1941)."
>
> *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. at 526-27.

See also, e.g., N.L.R.B. v. Wheland Co. (6th Cir. 1959), 271 F.2d 122, 124-25.

The Court of Appeals for the District of Columbia, in a unanimous opinion written by then Circuit Judge Burger, also discussed this issue in a case involving dovetailing of seniority lists, *Outland v. Civil Aeronautics Board* (D.C. Cir. 1960), 284 F.2d 224:

> *"The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject.* [Citations omitted.] Seniority is a matter of negotiation in the first instance and when confronted with the problem, the courts have recognized that factors other than time in service are also important. *No general rules can or need be laid down.* Of necessity the process of integrating two or more seniority lists calls for compromises in the process of negotiating a result. Here, as we have pointed out, the majority group had the same representation as the minority who now challenge the result. By its very nature the process of integrating the two seniority lists can sometimes lead to consequences unfavorable to some." [Emphasis added.]
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> *Outland v. Civil Aeronautics Board* (D.C. Cir. 1960), 284 F.2d at 228.

In summary, federal courts have historically shunned inflexible rules or definitions in seniority system cases. In this context, the Ninth Circuit's misconception of the nature and character of the 45 week provision is illuminated not only by the diversity of seniority systems in the United States, but by the similarity between this provision and other common seniority provisions.

B. The 45 week provision is virtually indistinguishable from any number of seniority provisions commonly employed in American industry.

First, the 45 week provision defines the extent of service which is a condition precedent to a higher level of seniority job rights. This provision is similar to any number of probationary periods, eligibility requirements, or other threshold standards which serve the same purpose: creating a tier of job rights distinguishable from those afforded to temporary, part-time or seasonal employees. *See, e.g.: Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521; *Watson v. Teamsters* (5th Cir. 1968), 399 F.2d 875, 877. In *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, *cert. denied* (1978), 436 U.S. 946, a separate tier of seniority based on "job equity"—a form of limited occupational seniority—was created, providing for the similar type of preference as exists in the instant case for "permanent employees."

Second, the provision for minimum service in one calendar year is similar to other common seniority provisions. A probationary period might require thirty days work in a two or three month period. Some probationary periods can last for six months or even a year. CCH, Union Contract Clauses, ¶ 51,429 (1954). Also, accumulated seniority credit is often lost because of time off, or even layoff. In this case, the contract provides, in essence, that more than seven weeks unemployment in a calendar year will cause loss of accumulated credit toward permanent status, without loss of other seniority rights.

Finally, seniority may be "measured in a number of ways," *Teamsters v. United States,* 431 U.S. at

355, n. 41, including some ways less related to a simple linear measurement of time than in the brewery system. Businesses with seasonal changes, such as department stores or delivery companies, often provide that seniority cannot be accumulated during those periods when the work force swells due to part-time or seasonal hires. Moreover, the device of superseniority is often used to protect the job security of union officials, without regard to actual time served. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U.S. 521.

C. The Ninth Circuit's definition of "seniority system" threatens the flexibility and adaptability of seniority systems.

1. The Appellate Court's definition is inconsistent with the principle that under Title VII no type of seniority system is preferred.

In *Teamsters v. United States*, this Court held that the scope of Section 703(h) was comprehensive and inclusive, including no distinctions between different forms of seniority.

> "[T]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, *seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression.* [Citations omitted.] The legislative history contains no suggestion that any one system was preferred." [Emphasis added.]
>
> *Teamsters v. United States*, 431 U.S. at 355, n. 41.

In so holding, this Court recognized the great diversity in seniority systems throughout the nation.

Following *Teamsters*, the Sixth Circuit in *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, *cert. denied* (1978), 436 U.S. 946 adopted a realistic view of seniority systems. The district court in *Alexander*, in its opinion, stressed that the "job equity" feature of the seniority system perpetuated the present effects of pre-Act discrimination. This "job equity" feature was very similar to the 45 week provision in the instant case. It gave an absolute preference in filling a vacancy to employees with prior satisfactory service in the particular occupation. Under this provision, whenever a vacancy occurred, all employees having any "job equity"—that is, prior satisfactory service in a specific occupation—were given the right to return to the job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. The effect of the "job equity" feature of the seniority system was that an employee with equity would always be preferred over an employee without equity even though the latter was deemed qualified for the position and had longer plant-wide service.

The Sixth Circuit's decision reflects an understanding that a bona fide seniority system need not be based on "strict" seniority:

> "Like this Court in *Teamsters*, we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters*, it applies equally to all races and ethnic

groups. To the extent that it '"locks" employees into . . . jobs, it does so for all.'

"With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. *The Act, however, speaks not simply of seniority but of a 'bona fide seniority . . . system.'* A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system." [Emphasis added; footnotes omitted.]

Alexander v. Machinists, Aero Lodge No. 735 (1977), 565 F.2d 1364, 1378-1379.

See also, e.g., Croker v. Boeing Co. (Vertol Div.) (E.D.Pa. 1977), 437 F.Supp. 1138.

2. Seniority systems must be scrutinized in their entirety. No individual component of a seniority system should be singled out for judicial scrutiny under Title VII.

If individual components of a seniority system are subjected to Title VII attack under the doctrine of *Griggs v. Duke Power Company* (1971), 401 U.S. 424, then the purpose of Section 703(h) and the holding of *Teamsters* will be frustrated. In this case, the Ninth Circuit decided that the 45 week provision is not even part of the overall seniority system. The

Court of Appeals did not pause to consider whether, as a matter of fact, the *entire* seniority system had a bottom-line effect of conferring higher benefits and security on the more senior employees. The appellate court's approach, if permitted, would open the door to litigation over every single detail and feature of any but the most simple "strict" seniority systems. Every contractual limitation on the operation of the seniority principle—including probationary periods, seniority unit definitions, provisions for loss or modification of seniority, and many others—could be found to have an adverse "impact." In short, the holding of *Teamsters* would be emasculated. Seniority systems could be attacked piece by piece, although "the sum of the parts" is supposed to be protected under Section 703(h) and *Teamsters.*

D. The principle that a seniority system must be bona fide is the only limitation on the immunity conferred by Section 703(h).

"To be sure, § 703(h) does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race . . . or national origin. . . .'"

Teamsters v. United States, 431 U.S. at 353.

As a result of the "bona fide" limitation to Section 703(h), Respondent must show that the entire brewery seniority system either: (i) had its genesis in racial discrimination; (ii) does not apply in an even-handed manner to all races; (iii) is irrational; or (iv) has not been negotiated or maintained free from illegal

purposes. *Teamsters v. United States,* 431 U.S. at 355-56.[15]

This precise formulation of the "bona fide" limitation essentially requires proof of intentional discrimination or the kind of bad faith necessary to prove that a union has breached its duty of fair representation under the National Labor Relations Act. In short, the fact that the "bona fide" standard is the single limitation on Section 703(h) illuminates the Congressional desire to allow employers and unions maximum possible freedom to adopt and adapt seniority systems in accord with the federal law of collective bargaining.

1. The "bona fide" or good faith limitation on Title VII protections for seniority systems parallels standards developed under the National Labor Relations Act.

There is no mystery about the reasons for the great diversity among seniority systems. Individual industries and unions have different needs and preferences naturally arising from varying circumstances. Not surprisingly, the collective bargaining process produces an infinite number of solutions to disputes over seniority issues.

The federal courts have intervened to uphold challenges to these bargains only in the clearest cases, preferring instead to allow "a wide range of reasonableness" to a "statutory bargaining representative in serving the unit it represents, subject always to complete

[15]The "bona fide" limitation to Section 703(h) is not directly involved in the instant case, although many other employment discrimination cases after *Teamsters* have focused on this limitation. *See, e.g., James v. Stockham Valves & Fittings Co.* (5th Cir. 1977), 559 F.2d 310, *cert. denied* (1978), 434 U.S. 1034. The Court of Appeals in the instant case explicitly stated that: "we are not required to address the question whether the provision was part of an unprotected seniority system, *i.e.,* one that is not bona fide." 585 F.2d at 428 n. 12.

good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman* (1953), 345 U.S. 330, 338.

In *Ford Motor Co. v. Huffman,* this Court sustained the validity of collective bargaining agreements whereby an employer gave employees seniority credit for pre-employment military service, as well as the credit required by statute for post-employment military service. In reaching its decision, the Court commented on the unique dilemmas inherent in the union's duty of fair representation and the nature of collective bargaining.

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. * * *
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> "Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service,

whether civil or military, voluntary or involuntary." [Citations omitted.]

Ford Motor Co. v. Huffman (1953), 345 U.S. at 338-39.

See also, e.g.: Vaca v. Sipes (1967), 386 U.S. 171, 177; *Humphrey v. Moore* (1964), 375 U.S. 335, 349-350; *Schick v. N.L.R.B.* (7th Cir. 1969), 409 F.2d 395, 398-399; *Hardcastle v. Western Greyhound Lines* (9th Cir. 1962), 303 F.2d 182, 187-188, *cert. denied* (1962), 371 U.S. 920.[16]

[16]Professor Aaron has provided a descriptive summary of the conflicts and disputes that must be resolved during collective bargaining. In so doing, Professor Aaron also articulated the realistic need for affording to the parties to collective bargaining a "wide range of reasonableness" and latitude:

"The role of the union in negotiating a seniority system thus becomes a matter of key importance to the membership. A debate among the members over whether the union should seek craft or departmental seniority, as opposed to district or plant seniority, for example, is not likely to be prompted simply by a desire to consider objectively the merits of competing theories; more probably, it represents a power struggle between the highly-skilled and the semi-skilled, between the older members and the younger, or between other rival groups within the union. Similarly, the union's role in administering the seniority system provides the opportunity for discriminating in favor of some individuals and groups and against others, not only within its own membership, but also as between members and non-members within the bargaining unit represented by the union. Whatever the union's practice may be in this regard, it usually is jealous of its own right to decide between the conflicting claims of the employees whom it represents, and is quick to challenge settlements of seniority grievances between individual employees and employer representatives to which it has not been a party.

"That portion of the union's power over employee job security which stems from its roles as negotiator and administrator of seniority provisions in collective agreements has been greatly enhanced by judicial decisions. Although the courts consistently have adhered to the principle that the union 'is responsible to, and owes complete loyalty to, the interests of all whom it represents,' they have tempered the application of that rather uncompromising formulation of the duty by taking into account the realities of industrial life. * * *

* * *

"In negotiating seniority provisions . . . the union is permitted a considerable latitude of discretion. Subject only to the requirement of good faith, it may propose or agree to changes in existing seniority rights that are adverse and detrimental to the interests of some of the employees affected. The same generally is true in respect to administration of the seniority system, ..."

B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1535-1536.

[17]Compare *Teamsters v. United States,* 431 U.S. at 355-56 and *James v. Stockham Valves & Fittings Co.,* 559 F.2d at 352 with the following passage from *Griffin v. International Union* (4th Cir. 1972), 469 F.2d 181:

"A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct."

469 F.2d at 183.

These standards for ascertaining a breach of the duty of fair representation are strikingly similar to emerging standards for determining whether a seniority system is not bona fide.[17]

2. In light of Teamsters holding that bona fide seniority systems are protected, Respondent must prove intentional discrimination in order to prevail.

The provisions of Section 703(h) represent an exception to the general principle of *Griggs v. Duke Power Co.* (1971), 402 U.S. 424, that good faith and lack of discriminatory intent are not sufficient defenses to claims of employment bias in violation of Title VII. This exception is consistent with the historical treatment of seniority systems under the National Labor Relations Act.

The need for a "wide range of reasonableness" compels a reversal of the Ninth Circuit's judgment. If the Section 703(h) exception can be circumvented by highly unpredictable, unprecedented judgments that certain contractual provisions are not "parts" of seniority systems, then the task of parties to collective bargaining is grievously complicated. Employers and unions would not have the flexibility and freedom to devise new resolutions to seniority issues, for fear that their bargain might be nullified as the individual components of seniority compromises are separately subjected to judicial scrutiny.

Federal courts should not undertake to establish inflexible rules for the negotiation and maintenance of seniority systems. The agreements of employers and unions respecting seniority should be presumed to be rational and reasonable solutions to the difficult issues inherent in industrial life. After all, as this Court recognized in *Furnco Construction Company v. Waters* (1978), 57 L.Ed.2d 957, "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 57 L.Ed.2d at 968. Courts should adhere to the long-standing principle that the bargains of employers and unions be tested and examined only to insure that they are the products of good faith. This standard of judicial review should not be discarded in an effort to circumvent *Teamsters v. United States.*

IV

THE APPELLATE COURT ABUSED ITS AUTHORITY WHEN IT PURPORTED TO ESTABLISH THE LAW OF THE CASE RESPECTING THE 45 WEEK PROVISION'S RELATIONSHIP TO THE BREWERY SENIORITY SYSTEM WITHOUT FACTUAL BASIS AND DESPITE CLEAR ADMISSIONS BY RESPONDENT.

Whether the 45 week provision is part of the brewery industry seniority system is a mixed question of law and fact. *Cf. James v. Stockham Valves & Fittings Co.* (5th Cir. 1977), 559 F.2d 310, 353, *cert. denied* (1978), 434 U.S. 1034. Respondent's admissions[18] and a careful examination of the collective bargaining agreement suffice to demonstrate that the 45 week

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[18]At all times prior to this Court's decision in *Teamsters,* Respondent Bryant *proclaimed* that he was attacking a seniority system which had the effect of perpetuating the present effects of past discrimination.

Respondent's characterization of the 45 week provision as "seniority" provisions was repeated frequently throughout the verified Second Amended Complaint. [A.16, 18-19.]

On appeal, Respondent contended that "*a seniority system like the instant one* . . . , though it now may be operating with an even hand, has the effect of perpetuating the discrimination of the past." [Emphasis added.] Opening Brief for Appellant, p. 10. Throughout all briefs filed by all parties on this appeal prior to this Court's decisions in *Teamsters,* there is not the slightest suggestion that the 45 week provision was not part of the seniority system.

Indeed, only after this Court's decision in *Teamsters,* after all other briefs had been filed, and after the employers had no opportunity for reply, did the Respondent first suggest that the 45 week provision might not be a seniority system. Appellant's Supplemental Memorandum of Points and Authorities, p. 3, filed July 17, 1977. Even at this late date, the Respondent conceded that the overall seniority system was immune from attack under Title VII. "*Notice we are not calling into question the overall seniority system* in the brewery industry; for the system—even though it admittedly perpetuates the discrimination of the past—is beyond attack under this Court's decisions." *Id.,* pages 3-4 [emphasis added].

provision is a seniority provision (*See* Argument II). In any case, a decision to the contrary is certainly not justified at this stage.

A. The Court of Appeals purported to foreclose further litigation over the relationship of the 45 week provision to the seniority system.

The Court of Appeals unambiguously held that as a matter of law the 45 week provision is not part of the seniority system. That the Court of Appeals understood the consequence of this holding is clear from its additional instructions to the district court. Respondent would not be "required to prove any form of intentional discrimination to make out a Title VII violation." 585 F.2d at 427. Thus, it was the apparent intention of the Court to foreclose further litigation over the seniority aspects of this provision.[19]

B. The Court of Appeals' determination was rendered despite the absence of a factual record.

The Court of Appeals went to great lengths to theorize that junior employees might acquire permanent status before more senior temporary employees. Even

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[19]Admittedly, the Court of Appeals did state: "For purposes of this appeal, the complaint is construed in the light most favorable to [Respondent] Bryant and its allegations are taken as true." 585 F.2d at 425. However, there are no expressed qualifications on the Court's holding that the 45 week provision is not part of a seniority system. Moreover, the Court remanded "for further proceedings consistent" with its opinion. 585 F.2d at 428.

In the Brief in Opposition to the Petition for Writ of Certiorari, Respondent also claims that "the Court of Appeals had before it all the facts required for decision," while asserting that the Court's "finding" respecting the 45 week provision was based on the "clear and unambiguous terms" of the contract. Respondent's Brief in Opposition, p. 7.

if the job dispatching provisions do not foreclose this theory, there are no facts in the record to support the hypothesis of the Court of Appeals.

The record before the Court of Appeals included only the terms of the collective bargaining agreement. However, the complicated contractual terms must be illuminated by evidence on overriding factual issues, some of which are defined by some of the Ninth Circuit's theories:

(1) *Whether the system, in fact, operates so that employment rights increase as a result of seniority.*

(2) *Whether "unemployment patterns" and "manpower needs" can be manipulated, as the Court of Appeals speculated.*

(3) *Whether the system is administered according to the terms of the contract.*

C. The Court of Appeals acted improperly in purporting to foreclose further litigation of a factual issue in the context of a 12(b)(6) motion to dismiss.

The dismissal of a complaint for failure to state a claim upon which relief can be granted is necessarily made before the full development of a factual record. A motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. Accordingly, the judicial task, in the context of a motion to dismiss, is to evaluate the complaint to ascertain whether there is any set of facts which could support the claims, and not whether such facts have been established. Likewise, an appeal from a trial court's granting of a 12(b)(6) motion

is no occasion for making binding determinations of factual questions.[20]

This Court recognized these limitations of the motion to dismiss in *Scheuer v. Rhodes* (1974), 416 U.S. 232. That litigation grew out of a district court's dismissal of civil damage suits brought by the estates of persons killed in the Kent State riots on the theory that the defendants were, as a matter of law, immune from liability for the actions alleged in the complaint. On the narrow issue of the propriety of dismissal at the inception of the litigation, this Court reversed the Court of Appeals' affirmance of the district court's dismissal.

Against this background, the Court confronted the issue of whether the defendants were entitled to absolute immunity, in which case dismissal was proper, or merely qualified immunity, in which case dismissal was premature. *See* 416 U.S. at 239. Upon determining that the defendants could only lay claim to a qualified immunity, the Court decided further evidence was required and held that the plaintiffs were entitled to have the case proceed to adduce what evidence they could in support of their claims:

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[20]For example, the Court of Appeals stated: "[N]o black has ever attained permanent employment status in a California brewery." 585 F.2d at 424. Although there are allegations in the Second Amended Complaint that might be interpreted as making this assertion [A.16-17], there are no facts to support this statement of the Court of Appeals, if it was intended as a conclusion. On remand, the California breweries will have the opportunity and are prepared to demonstrate that blacks have achieved permanent status in the California brewery industry.

> ***"These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here.*** * * * In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed."
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> *Scheuer v. Rhodes, supra,* 416 U.S. at 249-50.

In short, any doubts of the Court of Appeals respecting the 45 week provision should not have been forged into a premature partial judgment. The case should have been remanded "without the slightest murmur of a suggestion as to how [the case] should or will come out when the real facts . . . are developed. . . ." *Mann v. Adams Realty Co., Inc.* (5th Cir. 1977), 556 F.2d 288, 297.

See also, e.g.: Lipsky v. Commonwealth United Corp. (2d Cir. 1976), 551 F.2d 887; *Braden v. University of Pittsburgh* (3d Cir. 1977), 552 F.2d 948.

In sum, the relationship of the 45 week provision to the overall seniority system has never been briefed, argued or considered in light of a full factual record. The Ninth Circuit erred by summarily denying the seniority character of the brewery system before the trial court had an opportunity to gather the evidence and make the appropriate factual findings. *Cf. Hazelwood School District v. United States* (1977), 433 U.S. 299; *East Texas Motor Freight System, Inc. v. Rodriguez* (1977), 431 U.S. 395; *Fountain v. Filson* (1949), 336 U.S. 681; *Mariash v. Morrill* (2d Cir. 1974), 496 F.2d 1138.

CONCLUSION

Teamsters v. United States interpreted Section 703-(h), reaffirming the congressional decision to place bona fide seniority systems beyond the reach of Title VII. By contrast, the Ninth Circuit's decision purports to establish a rule of law that threatens the flexibility, diversity and adaptability of seniority systems to the different industries throughout the United States, contrary to the explicit congressional purpose embodied in Section 703(h). If the Title VII protection for seniority systems is to be effective, this Court must adopt a realistic definition of seniority systems and safeguard specific components of such systems from attack.

Therefore, the Court should vacate the judgment of the lower Court and rule that the 45 week provision is a part of the overall seniority system.

On remand, the Respondent should be confined to his allegations of intentional discrimination.

Alternatively, at a minimum, the district court should be instructed to disregard the opinion of the Ninth Circuit and to consider the relationship between the 45 week provision and the seniority system based on a full factual record.

Respectfully submitted,

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